In re:

ATTORNEY GENERAL'S CAPITAL CASE COMMISSION

Phoenix, Arizona
July 15, 2002
9:30 a.m.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Prepared by:
JoAnn Klemm, RPR
Certified Court
Reporter #50022

SOUTHWEST REPORTING
P.O. Box 310397
Phoenix, Arizona 85046-1039
(602) 788-5151

The Attorney General's Capital Case Commission was taken at 10:00 a.m., on July 15, 2002, at Office of the Attorney General, 1501 West Washington, Room 119, Phoenix, Arizona.

Appearing were: Janet Napolitano, Attorney General, Chair;

Mr. Paul Ahler, Maricopa County Attorney's Office;

Dr. Peg Bortner, Ph.D., Center for Urban Inquiry, College of Public Programs, Arizona State University;

Mr. James Bush, Fennemore Craig, Chair, Governor's Mental Health Task Force;

Mr. Jose Cardenas, Lewis and Roca, LLP;

The Honorable Dave R. Cole, Maricopa County Superior Court Judge;

The Honorable Stanley G. Feldman, Arizona Supreme Court Justice;

Mr. Charles Hastings, Yavapai County Attorney;

Mr. Harold Higgins, Pima County Assistant Public Defender;

Mr. Christopher Johns, Maricopa County Deputy Public Defender, Appeals Division;

APPEARANCES CONTINUED:

Mr. Thomas LeClaire, Snell & Wilmer, LLP;

Ms. Gail Leland, Director, Homicide Survivors;

Senator Tom Smith, Arizona State Senate;

Mr. Lee Stein, Fennemore Craig;

Mr. John Stookey, Osborn Maledon, PA;

Mr. Steven Twist, Viad Corporation, Founder, Arizona Voice for Crime Victims;

Mr. Rick A. Unklesbay, Pima County Attorney's Office;

Mr. George Weisz, Executive Assistant to the Governor;

Ms. Lois Yankowski, Pima County Assistant Legal Defender, Appeals Section.

Mr. Michael Kimerer, Kimerer & LaVelle;

Mr. Charles Krull, Maricopa County Deputy Public Defender, Appeals Division.

(Whereupon, the following proceedings ensued):

* * * *

Phoenix, Arizona
July 14, 2002
9:30 a.m.

MS. NAPOLITANO: Good morning, everybody and welcome to Ring Aftermath, Part 2, where we are going to go through some of the issues that were discussed last week with respect to what changes need to be made in the Arizona sentencing statutes to comply with the Supreme Court opinion in Ring.

If I might, just to help us through this -- and then I'll call on Judge Cole to give us the thoughts of the trial committee that met at length on Wednesday afternoon.

That was a week, by the way, that it was Judge Cole's vacation. I think he should get an extra brownie point for taking time off of his vacation.

I understand it was a very long and productive meeting and, of course, as people look at this, many of them -- many of you are calling me or e-mailing me, and I'm seeing some consensus develop on some of the basic issues that would have to go into a bill.

If I might, let me outline what I believe those basic issues to be, so that we can get a sense of the Commission on those.

The first basic issue is whether the jury should actually find for the death penalty or simply find the aggravating factor and make the recommendation.

I will tell you that the consensus of the Commission appears to be that the jury should not only find aggravating factors, but also make the decision as to whether to impose the death penalty.

And so before we move on, I just want to make sure that everybody knows that's kind of what has been polled and what we're hearing, and we'll hear from the trial committee, as well.

The second issue what happens if the jury decides it's not a death penalty. The death notice case the jury hears the sentencing phase and decides no, death is not appropriate. Should the jury then go ahead and make the determination of 25 years to life or natural life sentence, or should it go back to the judge to be sentenced as if the case had never

been death noticed in the first instance.

From the e-mails and calls I've received, there seems to be a consensus that it should go back to the judge at that point for sentencing and be sentenced as if it had not been a death notice case to begin with.

The third issue that I've received a lot of e-mails and calls about is what happens if the sentencing jury hangs. Can there be a second jury impaneled? Can there be a third jury impaneled?

I have -- this one is fairly divided. The APAAC proposal provides for multiple -- what we call bouncebacks, to use a shorthand word. There seems to be a sentiment developing that there should be, at most, one bounceback, which means if you have one hung jury, you would only have the ability to call a second jury. And then the case would terminate as a nondeath case. So the bounceback issue.

The fourth basic issue concerns what is the Supreme Court's standard of review to be. The proposed statute keeps -- I'm sorry, the proposed statute would change the Supreme Court's standard of review of the findings of

the jury to abuse of discretion, which is consistent with usual appellate court review of fact findings of a jury.

There is a sentiment, and I won't call it a consensus yet -- and I think we need to talk about it in the room today -- that the independent review of the Supreme Court should be retained.

The sentiment, as far as I'm hearing, is based on two thoughts. One is that the Supreme Court should have a free hand to review these cases. And the second is that changing the standard of review may be a substantive rather than a procedural change, which would impact litigation in opinion cases.

The fifth issue that is an issue that needs to be included in the statute is how we handle the victim impact statements. And we need to be very clear how we handle them at the death phase of the sentencing, where you are restricted by the requirements of Payne versus Tennessee versus what the victims and when the victims are able to allocate or provide their information if the sentencing reverts to the judge or if there are nondeath counts also

before the jury.

So I would like us to take up those five issues. I'm just trying to help us get through this discussion in a reasonable time frame.

And I ask now Judge Cole if he can walk us through where the trial committee comes out. And then I think we should see if we reach consensus, or if not, we'll take a vote and get a decision of the house so we can tell the legislature what our vote was.

Judge Cole?

THE HONORABLE JUDGE COLE: Is there any particular order you would like us to take the issues?

MS. NAPOLITANO: No. I think if you take them in the order I presented them, it would track with the bill and also track with the order in a case, so I would suggest that you do it that way, but you're the judge, and I'm a lawyer.

THE HONORABLE JUDGE COLE: I'm not used to having much discretion.

I think the Attorney General did a good job of outlining what the issues are that the

trial subcommittee discussed last Wednesday, July 10th.

With respect to what has been called judge sentencing versus jury sentencing versus a hybrid, we only had four people voting on Wednesday, so it wasn't like our vote is going to mean a whole lot. Three people voted in favor of what we're calling pure jury sentencing as opposed to any of the other alternatives.

We did talk about the states that utilize kind of a hybrid sentencing procedure, but the feeling in the subcommittee was that that may cause more problems than it solves, and perhaps pure jury sentencing might be the most appropriate way to go. I believe there was a dissent on that. I'm smiling at John because he may have been the dissent, but I don't recall. That was the thought on sentencing.

Peg, at any point while I'm talking, if you want to jump in with anything on statistics, please do.

Do you have anything that these statistics might impact that particular issue?

DR. BORTNER: No.

THE HONORABLE JUDGE COLE: Nothing at all?

That was pretty much the extent of the discussion on that.

MR. STOOKEY: Can I explain my dissent. My dissent really reflects something that was not on the survey, because one of the concerns that a lot of us have had is with regard to the whole issue of residual doubt and how do we build a check into the system to ensure that we try to handle the issues of potential wrongful sentencing and so on.

Many states or several states have, as a hybrid system, a system that says that the jury finds the aggravating circumstances. The jury then makes a recommendation. If the jury recommends life, then that is the sentence.

If the jury recommends death, the judge has an option to override that death decision, if the judge believes that it is inappropriate based upon the evidence that he or she has heard.

This is a recommendation that is consistent with what has been made by the

Illinois Commission. And the Illinois Commission's reasoning, I think, is useful here because the Illinois Commission, like us, wrestled with the idea of what do you do with residual doubt.

One of the proposals before that Commission was that if the jury had residual doubt as to guilt, they, then, ought to vote for life imprisonment. It ought to be a mitigator.

That Commission concluded that that was probably an unrealistic expectation to place on a jury. That a single jury says, "Okay. This person is guilty beyond a reasonable doubt," and then still asks them about residual doubt.

Their way of handling that problem was the hybrid system that we're talking about here, that the judge becomes the voice of residual doubt. So the jury does its job. If it recommends life, end of story. If it recommends death, the judge can still reweigh or reevaluate based upon whether he or she sees residual doubt.

MS. NAPOLITANO: So we should have kept judge sentencing.

MR. STOOKEY: But I think you would agree.

MS. NAPOLITANO: That is the Illinois view.

MR. STOOKEY: I think it is not inconsistent with Ring. Would you agree?

MS. NAPOLITANO: I'm not sure I do. I'm not being facetious, John. I want to tell you the more I read Ring -- you know, you can read Ring or you can read Ring as a predictor of case law to follow.

And I think we have not really seen where the Supreme Court is going on this issue of what role the judge can play in sentencing, not only in death cases but in nondeath cases, as well. So that's why, you know, I'm not sure that anything other than pure judge doesn't just put us in the same ball of wax for the next year.

I note that the Florida Supreme Court -- and Florida has a hybrid sentencing statute -- just last week stayed two of their executions on the grounds that they're not sure -- they want to know the impact of Ring on their hybrid sentencing in Florida. I don't

know.

I do agree that is what Illinois' reasoning is.

MR. JOHNS: Maybe to add to what John said, I pulled the Colorado statute that was passed on Friday by their special session. And what they did retain in there is a clause that says, "In the event the jury's verdict is to a sentence to death, such verdict shall be unanimous and shall be binding upon the court unless the court determines and sets forth in writing the basis of reasons for such determination, that the verdict of the jury is clearly erroneous as contrary to the weight of the evidence in which the case -- in which case the court shall sentence the defendant to life imprisonment."

This retains the old judgment notwithstanding the verdict language that might serve the same purpose that John was talking about as a residual doubt fail-safe in the statute.

I throw that out. That's the system that Colorado came up with in putting in their statute.

MS. NAPOLITANO: Do you know what standard of review the Colorado statute has?

MR. JOHNS: I was going to get to that later on, as well. They do retain a reweighing statute, as well, and it appears that it is somehow hooked up to an abuse of discretion standard, as well.

But it does allow for the Supreme Court to reweigh any aggravator, and if it finds that the aggravator is not appropriate then it reweighs the entire case whether death was appropriate.

MS. NAPOLITANO: Other comments?

Peg?

DR. BORTNER: I beg the indulgence of the Commission because of our timing. We have not had the opportunity to discuss a handout that you received last Monday.

And this is probably one of the most important pieces of data. And I feel -- and we've replicated it in the yellow for this morning. This is exactly the same handout you got last Monday.

I'm not presuming that you had time to read it, let alone digest it. But because

we're on the record, I think it's extremely important to contribute whatever data pieces might be relevant.

This particular issue, I think, is as relevant to the standard for review as it is for the issue of whether it should be pure jury or jury and judge sentencing.

On Page 2 of the yellow, underneath Convictions for First Degree Murder at Death-noticed Trials -- now, these are the multivariate findings. These are quite qualitatively different than much of the data that we've been reviewing over the last two years.

Multivariate statistical analysis holds relevant known factors constant. Basically, statistically, we're saying if we hold constant those things that we know about -- and let me say very quickly: There are things that we do not know about in the data sit, but we do know about some significant things.

The things that are held constant in this analysis are county, defendant race, defendant sex, defendant age, co-defendant, whether there are co-defendants or not, number

of victims, race of victim, and whether or not the victim and defendant were strangers or nonstrangers.

What multivariate analysis does is hold constant those things that are known, and then measures the independent effect of each of those factors. Anything that shows up on Page Number 2 is an independent effect having held constant all the other things that we know.

There were two things that were evident and statistically significant for those individuals who were death noticed, taken to trial, and who was more likely to be convicted for first degree murder at death-noticed trial.

Only two of the variables were statistically significant. One was whether or not the defendant and victim were strangers, and then secondly, what is the race of the victim.

In the first one, strangers -- and when it says 242 percent more likely, that means that those defendants whose victims were strangers, were over three times as likely, 3.4 times as likely than defendants with nonstranger victims to be convicted of first

degree murder at trial.

And the second one -- and this is a theme throughout the multivariate analysis -- those death-noticed victims whose victims were white were over three times as likely as death-noticed defendants whose victims were not white, victims of color, to be convicted of first degree murder at trial.

I'm giving you the data. The interpretation, of course, would vary. I don't think this is in any way a pure test of jury trials. And it's interesting that these data are sort of like the before Ring, and we'll be gathering the after Ring, I'm certain.

When we talk about white victims having held other things constant, a death-noticed defendant is over three times as likely to be convicted at trial by jury.

MS. NAPOLITANO: What would that suggest to you in terms of the proposal on the table for jury sentencing?

DR. BORTNER: I would suggest that some people would say, first of all, there aren't as many things that are statistically significant under the jury trial as there are on other

sections, death notice or death-noticed trials, but I think some individuals might use this as a cautionary note about jury trials.

Now, again, I think we're talking about a lot of things in terms of this particular stage of the trial -- of the process. But the fact that when you compare defendants who have white victims to defendants who victims of color, that those who have gotten this far in the process are three times as likely to be convicted by juries of first degree murder, that would give some people pause about the jury decision making process.

MS. NAPOLITANO: Mr. Weisz?

MR. WEISZ: It seems that the argument we're hearing now is going against jury sentencing rather than sticking with the judge rather than going with Ring on a lot of things. Just a comment.

DR. BORTNER: Let me respond, please. I am not arguing anything at this moment. What I'm doing is putting the data on the record for future discussion. Yes, I quite agree with you, and I have no intention of engaging in that argument.

MS. NAPOLITANO: It seems to me that, you know, even after we get through today, when we get to kind of where we turn up as -- looking at all the data or whatever the meeting that was supposed to be today that we've now had to postpone, we're going to have to look at that victim issue and see what, if anything, should be done about it.

But I think what Peg is telling us now is that she would favor having a judge have a safety valve option to a jury, because a jury may act improperly.

Is that -- am I correct?

DR. BORTNER: I'm just reiterating the data.

MS. NAPOLITANO: You're a Commission member.

DR. BORTNER: As a Commission member, I'm just saying that the standard of review, I think this has significant import for, but in terms of whether it would be a hybrid system or a pure jury system, I think this would cause us to say we should look more at the issue of jury results.

I think it's a very different situation

when the jury does not assume it's going to impose death. I think conviction is one thing, and position of death is another.

MS. NAPOLITANO: Why don't we, if I might, unless somebody has something that hasn't been said to say, okay --

MR. CARDENAS: Janet, this is Jose. I have a quick comment: I would favor something like what John proposed because it goes a long way to dealing with one of my principal concerns, which is the APAAC proposal, which is the lack of definition of aggravating and mitigating factors.

And one of the big mitigators that I'm most concerned about is residual doubt, which isn't even listed and which our pretrial issues committee struggled with in part by saying, "Well, the judge could figure it out," but the jury won't have that benefit.

I favor something like what John proposed. I think it was Chris who mentioned the Colorado statute, which I don't think preserves -- given the standard of review there -- I don't think it preserves residual doubt. I would be in favor of something like

John said.

MS. NAPOLITANO: Let me see if we can break the vote into two parts. The first part being: Do you believe the jury should make the decision in the first instance, death or no death. And let's vote on that.

And then the second decision would be: Do you believe if the jury is to make the decision -- death, no death -- do you believe there should be a provision that would allow the trial judge with certain findings to overrule the decision of the jury?

JUSTICE FELDMAN: Madam Attorney General, far be it from me to talk about language in a statute, but I've been sitting here thinking whether it would be better to keep my mouth closed, or whether it would be better to say something. I think -- I don't know which would be better.

MS. NAPOLITANO: It depends on what you're going to say.

JUSTICE FELDMAN: You're not going to agree with what I'm going to say. Maybe no one will, and I don't care.

I've spent 20 years sitting on this

court. I am personally responsible for perhaps 100, maybe more, people on death row, and I sit here listening to you try -- and you are trying -- to find -- to perfect what I consider to be the imperfectible, to make fair what I consider something that could never really operate fairly. And you haven't even discussed the other alternative. And I think you need to think very long and hard about it, and the Legislature needs to do so, also.

What I'm about to say is not the product of some left wing, knee jerk liberalism. It's not a modeling worry about defendant's rights.

In my considered judgement, after 20 years of experience and working on I don't know how many cases involving capital sentencing, there is no way to really do it right. The final decision has always come down to the members of our court as to whether someone should live or someone should die. I am not smart enough to make that decision on any fair and consistent basis, given the tremendous range of facts and circumstances that affect every victim, every defendant and every set of

facts that go to make up a case.

In my considered judgment, the only thing that will work and that is the thing that would be most fair to victims that will result in getting these cases closed and make them final so that people can at least try to get on with their lives, that will avoid years of litigation -- and whatever you do, let me tell you, as long as the death sentence is going to be in effect, there will be years of litigation, no matter what the Legislature passes, because I can give you a list of issues that will take 10 years or to 15 years to settle.

Maybe somebody ought to try and think whether we should have a death penalty at all. And maybe we ought to try think about what the range of sentencing should be simply life with possibility of parole or life without possibility of parole, and make that the choices for capital -- or for first degree murder and only that.

I just don't understand why no one is even thinking about it, or if they have, why we're not having any discussion about it before

we make final recommendations to the Legislature, because now is the time.

MS. NAPOLITANO: I think, Justice Feldman, the procedural questions arising from Ring, you are right. The ultimate question is should we have a death penalty in the State of Arizona. And I think there is disagreement among the Commission on that, and I think at our next meeting that is one of the issues to be taken up.

I think what we're trying to do today is simply get through what do we do with the cases in the pipeline now? How does the statute need to be amended to comply with Ring, without barring anyone from going to the Legislature and making the pitch for, as you say, why are we perfecting an imperfectible system, in your view.

JUSTICE FELDMAN: I knew you weren't going to like what I was going to say, but it doesn't make any sense to me at all at this juncture to recommend to the Legislature that it pass a procedural statute dealing with the death penalty without first taking into consideration whether we ought to have a death

penalty and whether we ought to be recommending to the Legislature that it might be better to do away with it, both as to the pending cases that are affected by Ring and the cases that come in the future.

MS. YANKOWSKI: I agree with Justice Feldman, and I think we could even break it down farther.

In terms of the pending cases, I think to try to rush through legislation like this, we'll end up with generations of litigation. It may well be held unconstitutional. It probably does not reflect any consensus of what we're doing.

I'm not prepared to vote one way or another on any pending legislation. I agree with Justice Feldman that -- I'm an opponent of the death penalty. That, however, can be taken up at a later issue when we need full airing of that issue and to hear from all of us on that issue.

As for the pending cases, I think this is a full, hardy effort that is going to bankrupt the State. It's going to cause the victims just heartache well into the middle of

the next century, and we should say right now we can't fix it as to those cases that are already in the pipeline. This is too big of a change to do right. It can never be done right. I will never be held constitutional.

MR. STOOKEY: At our trial committee meeting on what, last Wednesday, I made five motions, which were ruled to be out of order and not appropriate, because we were seeking at this point to simply evaluate this proposed statute.

And those motions deal with the idea that we shouldn't be moving forward with a statutory change until we understand what implications that might have for reversal rates and wrongful convictions; that we shouldn't move forward until we understand what it might cost; that we shouldn't move forward until we understood whether the kinds of functions that were being asked to be performed by the prosecution and the defense could be performed; and we certainly shouldn't move forward with a statute that says that it's going to go into effect the next day, whether anybody knows how to work with it or not, whether anybody has

funding to do it, and it ought to be retroactive to apply to all the people that Justice Feldman are talking about.

I objected to all of those. And I guess I would reurge those motions, because I believe Justice Feldman and the essence of what he is saying and what we've just heard is exactly right, that we are here without those kinds of issues, rearranging the deck chairs on the Titanic.

MS. NAPOLITANO: Anyone else?

Peg?

DR. BORTNER: Yes. Just procedurally, I think that we must at least consider what Justice Feldman has said as a motion, and I would second that motion.

If the Commission wishes to table it, which I understand in terms of the way we've proceeded, that we were going to discuss Ring today and then independent of what the Legislature does.

I think we should at least have the motion on the table that Justice Feldman has made, and I, as a Commission member, would second that.

MR. UNKLESBAY: I can hear John. I can always hear John loud and clear. For other people who want to speak, for those of us on the phone, if they could use the microphones it would help a lot.

The comment that I would like to make on this two years ago when we started this Commission our stated purpose was to come up with recommendations to make the system that we have in Arizona more fair, more efficient, and more effective.

We've been operating under that principle now for two years. And nearly two years ago, Ms. Napolitano, as chair of the committee, you indicated this was not a committee about the abolition of the death penalty.

I would very much object to the motion that has been made and seconded. It is not part of our original charter, and it is not part of today's agenda.

Had I known that certainly that would come up on the agenda, I would have made the effort to come up to Phoenix today rather than trying to listen to what is going on on the

phone. I would object to anything that is not on the agenda, the stated purpose of today's meeting being discussed in the absence of the full committee in Phoenix.

MS. NAPOLITANO: Mike?

MR. KIMERER: I would like to join in what Justice Feldman says. And I just heard what Rick was talking about, and I guess what concerns me -- we've learned a great deal in the last two years. We've learned we don't have a very good system as far as the death penalty goes.

I think, I admit, as everyone knows, that I am opposed to death penalty. But I think everything we've learned through the studies for the first time that have been extensively done, is that the death penalty doesn't work. It doesn't satisfy victims. It is fairly imperfect, and I don't think there is really any way to really fix it.

I would be in support of what Justice Feldman says. It's almost hypocritical with something we know is wrong and sit down and put more flaws in the system.

Whatever legislation we're going to

propose that doesn't avoid the issue of whether we should have a death penalty or not is going to tie up the courts for how many years, and all the people out there -- we're going to be in litigation for whatever decision we make for years; and we're just extending the entire process.

And I think in good conscience that we're responsible people, and if we have a brain in our head, we should direct the issue: Should we or should we not have the death penalty?

Just to say it's not on our agenda, I think is wrong, because this is a committee of pretty bright people that have been in this system as long as I can remember, both sides. We should meet it head on.

MS. NAPOLITANO: Anyone else?

George?

MR. WEISZ: Attorney General, first of all, I think you've been very open to discussion on all kinds of topics throughout this process as we've had this Commission, and I agree with Rick as to where we were headed or our charge when we first started.

On the other hand, while I respect everybody here and what they've been through in the system for many, many years, as a lot of have whether we're attorneys or not -- to hear a number of people talk about what is right for victims and speaking on behalf of victims.

There are a lot of victims who have been put through procedures and appeals for years and years and years but who stuck in there because they believe in the death penalty. They thought that was appropriate closure. There are certain people who deserve to have the death penalty.

So I think for a number of people say we're doing what is right for victims by voting to get rid of the death penalty I don't think is necessarily accurate on the victims I've dealt with for many, many years.

So I think that is something to keep in mind. I don't mind any discussion on any issue, but the idea that we were set up for -- as Rick pointed out -- was to deal with trying to correct flaws and not make more flaws. There have been flaws pointed out. This Commission has done an outstanding job of going

through that with data sets and putting actual information together instead of rhetoric, but to go through and actually try to make things better. That's what we're trying to do in light of the Ring decision.

JUSTICE FELDMAN: May I add something? I should have said this at the beginning. I spoke for myself. I didn't speak for the court. I have no authority to make that statement on behalf of the court. It was my own views.

As far as what our initial charge was, Mr. Unklesbay is quite correct about our initial charge, but that was formulated before Ring came out and before we were put in the position of having to decide how to pass a new statute that controlled the entire procedure of sentencing.

I would think, again, that if we were going to ever try to help the Legislature in attempting to decide whether or not this system makes any sense or will make any sense, now is the time.

As far as victims, I can't speak for any particular victim or group of victims, but

I sit there with every case thinking of the effect that any decision is going to have on victims, and I can tell you that while I'm sure there are many victims, Mr. Weisz, who would like to see the death penalty apply to those who deserve it, while I would agree that there are a lot who deserve it, including some I would take a dull knife to, if I could only tell which were which.

My only thought about victims -- having some experience in the past, I can foresee the future. You are going to have endless litigation no matter what you do. If Ring hasn't taught us that, I don't know what will.

MS. NAPOLITANO: Mr. Ahler?

MR. AHLER: I'm going to have to join with Rick and Mr. Weisz on this. We were charged two years ago with looking at the current system.

The current law in this state is that the people have elected to have a death penalty. And we were charged with trying to make it fairer. And to switch gears at this point I think is improper.

I'd also comment on the issue of

victims -- and maybe Steve can talk to this, too -- but we are currently contacting all of our victims on our pending cases, and we have over 50 death penalty cases pending right now.

I believe the consensus from these people is they don't want us proceeding until the Legislature has fixed this problem, but I'm not hearing a groundswell of support from the victims -- at least that we've contacted -- who would indicate that we should just drop the death penalty.

Lastly, and this is a little sensitive, and I feel a little uncomfortable saying it, and with all due respect to Justice Feldman, I feel a little uncomfortable with him addressing this committee on this issue, because he has to sit and decide on these Ring cases. I'm not sure it's appropriate for him to be making the motion at this committee at this time.

JUSTICE FELDMAN: I didn't make any motion, Madam Attorney General.

As far as propriety is concerned, there comes a time where you've got to stand for what you believe.

I don't know how many, if any, Ring

cases I will sit on, because I'm leaving the court, as you know. I suspect that most of them, if not every one of them, will come later.

But it's just not a good thing to do to sit and keep your mouth shut when experience teaches you that we are about to jump, again, into the abyss.

MS. NAPOLITANO: Jim?

MR. BUSH: Madam Chairman, I guess I'm somewhere in between on this issue. I don't -- I'm not offended by Justice Feldman bringing this up, although as I understood the function of this Commission was not to make a determination whether we should have a death penalty but determine whether there were flaws in the procedure.

But it is my personal observation, having spent a lot of time working with the Legislature over a long number of years that this issue is not going to be solved by the Legislature.

If you send a recommendation up there to do away with the death penalty, it's not going to pass. This is a volatile issue.

There's only one way that this issue is going to be decided, and that is by a vote of the people. I'm not a fan of the initiative, but if there ever was an issue that should be decided by initiative, this one is it. It's simple. It's straightforward. The people understand it, and they're the only ones that are going to make the final determination. The Legislature will never, ever do it.

Now, having said that, as far as the death penalty, I guess I have some of the same feeling of Justice Feldman. I'm not opposed to the death penalty. I believe in certain amount of retribution. I believe there are people that commit crimes that there is no reason for them to live.

But he makes a very persuasive argument from the standpoint of the ongoing litigation, the cost of these things. I find nothing wrong with this Commission making some recommendations to the Legislature with respect to procedural issues of the five and what the consensus is of this group.

I find nothing wrong with this same group saying to the Legislature, "You ought to

consider whether or not you even want to go through this," because of the reasons that Justice Feldman has said. In other words, "You ought to think about whether or not the death penalty is really serving Arizona in the way that it should, or whether you should refer this measure to the people because they're not going to decide it themselves.

So personally, I would find no -- nothing wrong with our making some statement in addition to what the procedural thing is, that you ought to think about getting rid of the death penalty if you really believe it's not working.

MS. NAPOLITANO: Anyone else?

MS. LELAND: Speaking on behalf -- I have had the opportunity to work with many victims in capital cases over a long period of time and several of those where the execution did take place.

And overall, for most victims, the problem, the issues, the dissatisfaction they have is with the procedure rather than the final justice. Although there are some victims who are -- for religious reasons or other

reasons -- are opposed to capital punishment, most victims want ultimate justice, whatever that is, whatever the law of the land is.

For those victims where there was an execution that took place, they have initially they experienced depression. It didn't bring their loved one back. But soon after they experienced great relief, great freedom, that sense of what people call closure. It is truly over for them.

Unfortunately, that doesn't happen too often. So I think it's the procedures that victims need, and I think that's, as I understood it, our charge as a Commission.

MS. NAPOLITANO: Anyone else? We have a motion on the floor from Professor Bortner.

Rick Unklesbay on the speaker, do I take your comment to be a motion to table the Bortner motion?

MR. UNKLESBAY: It would be, Attorney General. As I said, I found out yesterday when I got back from out of town that the agenda had changed to be solely a discussion about the Ring issue today.

I don't know who else isn't there or

who else might be on the phone, but certainly if this was an issue that I knew was going to be brought up today or was on the agenda, then I would have made other efforts to be there. It may not make any difference, but it seems to me that we at least ought to complete our discussion about the data that Dr. Bortner's committee has been gathering before we make recommendation such as the ones that are on the table right now.

It seems to me that the recommendations are more because of how we all came into this committee and our feelings about the death penalty one way or the other when we first joined this committee rather than a discussion about the ultimate data that has been collected over the past two years.

So I think we owe it to the Commission before we make any final recommendations to discuss that data, which apparently we're not going to do today, and it's been taken off the agenda.

I certainly think we ought to complete our mission and discuss the application of recommendations that have come up and discuss

the final data report before we make the recommendations that other folks are talking about right now.

MR. HASTINGS: Madam Chairman?

MS. NAPOLITANO: Chuck?

MR. HASTINGS: Am I correct in assuming we're not subject to the Open Meeting law?

MS. NAPOLITANO: We have always construed these as open meetings and open to the press, and the press is here today.

MR. HASTINGS: Well, the reason I ask is because, as Rick pointed out, we're not agendized to vote on this issue at this point, to vote on a motion that I guess Dr. Bortner made. It doesn't appear on any communication or agenda that I've seen.

MS. NAPOLITANO: That's correct.

Lois?

MS. YANKOWSKI: I disagree that it's not on the agenda. If we're considering what to do about Ring, one of the things that I think is being suggested is that we're not in a position to make a recommendation about Ring right now because we need to consider other more ultimate issues. So I think that is

within the confines of any discussion on Ring. It has to be.

MS. NAPOLITANO: I'm not a parliamentarian. Thank goodness. Does a motion to table require a second?

You're in the Legislature.

SENATOR SMITH: I'm in the Legislature I don't have all the answers. No, I've never seen a motion to table require any second.

MS. NAPOLITANO: Let's do this. Let's take a vote on the motion to table. If it fails, we will proceed -- if it passes, we will agendize for later discussion the motion.

If it passes, we will proceed to a vote on Dr. Bortner's motion.

So the motion is to table Dr. Bortner's motion which, succinctly put, which suggests that we recommend to the Legislature at least a moratorium on the death penalty.

Peg, is that stated accurately?

DR. BORTNER: I think that will do. I didn't view myself as making a motion, but if I am now making a motion, that would be it.

MS. NAPOLITANO: But the motion you're voting is to table to motion. All in favor of

tabling, please raise your hand.

MR. UNKLESBAY: Can you see my hand? This is Rick Unklesbay.

MS. NAPOLITANO: Nine votes to table.

All opposed to tabling please raise your hand.

Eleven opposed to tabling. We will proceed to the motion.

Is there any further discussion on the motion?

MR. UNKLESBAY: Again, I apologize. I'm having trouble hearing some folks that are fading out there.

MS. NAPOLITANO: Can you hear me, Rick?

MR. UNKLESBAY: I don't know what the motion exactly is. Can you go back? Is it based on the data -- is it based on the data that we've collected and analyzed, or if it's based on the fact that Ring has come out, and we don't want to do anything at this point?

MS. NAPOLITANO: Peg, would you restate the motion you were making?

DR. BORTNER: I'm sorry. There is absolutely -- this reminds me of being in a faculty meeting. Really bizarre.

MS. NAPOLITANO: That's really mean.

DR. BORTNER: John understands.

MR. TWIST: The stakes are different.

DR. BORTNER: To be honest, there has been no second. I was assuming out of our response to anything that is brought to us -- the APAAC proposal was brought to us as a motion; that we were then dealing with a proposal that we were then considering.

I assumed that that would be the same procedure in dealing with Justice Feldman's statement. His further statement that he was not making a motion -- and thank you, Justice. I mean this very respectfully. I thought you were making a motion. I was seconding it.

We would need a second if I am making a motion. We can't have any vote on the motion not seconded.

For our discussion I will say based on Justice Feldman and other people's discussion, that the motion could be that there should be at least a moratorium to the death penalty in Arizona until this Commission has sufficient time to make a complete proposal.

MS. NAPOLITANO: Is there a second?

MR. KIMERER: Second.

MS. NAPOLITANO: Any discussion or have we already discussed it?

Jim.

MR. BUSH: Then if I vote on this motion, it means that we're not going to make any other recommendations. This would be a moratorium, and that's it?

That's kind of what I said at the meeting last time we were here, and everybody said, "You can't do that. There is an urgency about this thing. We have cases pending. What are we going to do with these people, have them sit?"

I would like to have a little response from those people saying that. Because I guess for the people currently on death row it's not a problem, but those who are awaiting trial, apparently it's a more serious thing.

MS. NAPOLITANO: Or awaiting sentencing.

Paul, do you want to respond to that?

MR. AHLER: I made the issue last meeting that there is a sense of urgency. We can't have these people sit there for however

long this Commission thinks it takes to come up with some sort of decision.

Ring did not throw out the death penalty in Arizona. And I think what the victims and what at least my position is that we need to go in and try to fix the statute in light of Ring, and that's why I thought we were here today. This has gone way beyond what the agenda was for this meeting.

MR. UNKLESBAY: Could I add something?

MS. NAPOLITANO: Yes.

MR. UNKLESBAY: If, in fact, the Legislature doesn't act and if it's because this Commission is proposing a moratorium, Maricopa County, I know, had a number and Pima County has a number of defendants who are currently pending sentencing that have been held up because of Ring or are pending trial right now wondering what to do.

And for -- and I agree with Paul, that Ring didn't throw out the death penalty, only the manner in which it has been applied. If we don't -- if the Legislature doesn't act quickly, then we've got -- what is going to result, I think, is somewhat chaotic because

we're going to have some judges that are going to try to apply Ring in the manner that they see fit, and that is maybe have a jury do it or maybe have a jury decide aggravating factors, and then the judge decide to do it.

And you're going to have a number of cases decided all around the state in a very chaotic and very different manners unless the Legislature acts and does so quickly.

And I think it would be irresponsible for this Commission to say, "Well, let's have a moratorium," and leave several dozen cases out there to pick their way through the system with trial judges trying to apply Ring in a manner that they believe it should be applied.

So I don't think that we should be adopting the motion.

MS. NAPOLITANO: Steve?

MR. TWIST: Thank you. I think sitting around the table we know there will be a special session. We don't know when but very soon. The Legislature will consider the APAAC legislation and others who have been put in legislation.

There may be, in fact, bills to abolish

the death penalty that are offered in that special system or moratoria legislation offered, but this is going to happen in a legislative session.

While I think there is a substantial body of opinion among the members of the Commission that agrees with Justice Feldman's position and those members of the Commission ought to have a right to vote and be heard on that, it would be a dereliction of duty not to, at the same time, following whatever the outcome is on this motion to nonetheless, proceed to consider the reforms that APAAC has proposed and to do so in a professional and diligent way.

MS. NAPOLITANO: Senator?

SENATOR SMITH: Madam Chairman, the information I have if they can't get a special session on the 29th or the 30th, it's not going to be held until about the 19th of August because of some legislative traveling in different places. They're going to conventions.

And also I must agree with Paul that I was under the impression that this was supposed

to be a very narrowly defined discussion based upon the Ring opinion. I'm certainly not a lawyer as you know.

I think if it's expanded, it's going to create more problems than it's going to resolve, and I think from what I can understand -- and I'm not on the inside track of that, but the Governor is going to have a very narrowly defined special session.

And I think that if we get too far away from implementation of the Ring decision, we're going to, again, muddy the waters, and we are not going to resolve it. I think we should stick to the issue. That's my personal opinion.

MS. NAPOLITANO: George?

MR. WEISZ: Madam Attorney General, just a question on the motion. The motion is a moratorium on the death penalty until we have a complete proposal. What do we mean by "complete proposal"? Is that when the Commission is supposed to end? Because we've extended ourselves, for good reason, for quite a while.

DR. BORTNER: Yes. I was talking about

considering the kinds of issues that Mr. Stookey has raised in terms of the kinds of things that the Commission has alluded to and have gathered some data on some of those. To me that would signal a complete rather than just -- I'm just suggesting that there are a lot of issues.

Certainly the five that the Attorney General has listed for today are very important issues to be addressed but they're not the complete makings of a new statute.

MS. NAPOLITANO: Justice?

JUSTICE FELDMAN: It may seem self-contradictory, but I agree with Mr. Twist and the Senator. There will be complete chaos unless the Legislature does something and does it at the earliest possible time.

The import and the thrust of what I was saying is rather than assuming that the Legislature in dealing with the Ring case -- that the Legislature only had the choice of some of trying in some way to find a constitutional system that would address the problems created by Ring, that we ought to be telling the Legislature -- and Mr. Bush may

well be right, that the Legislature may ought to be telling people -- that there is another way that we ought to think about and that we ought to consider, but whatever we do, whether it's abolishing the death penalty, whether it's adopting the APAAC language, whether it's adopting some other language, it needs to be done quickly because we have all of these cases that are in the pipeline, some yet to be tried, some that have been tried awaiting sentencing, the other 30-some-odd cases that are still on direct appeal, all of which have got to be dealt with in some way, and we need to know what way we're going to deal with them. I don't think we ought to assume that there is only one way in which we can deal with them.

As far as the uncertainty and the delay that will occur after whatever the Legislature does, that's going to be unavoidable, because whatever it does, if it doesn't abolish of the death penalty, it's going result, in my view, in 10 to 15 years of more litigation before we ever get to close any of these cases, and that is simply what I thought was going to be destructive to victims.

My God, I just can't imagine the uncertainty that will continue to afflict them while we -- I can give you the whole scenario, which I've laid out in my mind as to what will happen in the future because 20 years of experience gives me at least the ability to forecast what lawyers will do.

It's going to be a long time before we know what will pass muster and what will not.

MS. NAPOLITANO: Anyone else? I think this is how we should proceed, given that the motion to table did fail by an 11 to 9 vote. I think we should proceed to the motion and get the committee's vote on the motion, and then proceed to go back to the procedural questions on Ring with the assumption that regardless of what this Commission decides on, should there be a special session or not, there is going to be a special session on Ring, and we should put in our two cents' worth on the procedural questions that have been raised.

In other words, we're not going to be done if five minutes. Hunker down, everybody.

With that in mind, all in favor of the motion, would you please raise your hands?

MR. JOHNS: I'm not clear what the motion is, and I want to make an amendment to it.

MS. NAPOLITANO: All right, Mr. Johns.

MR. JOHNS: What I understand Justice Feldman to be saying is a little different from what I understand Dr. Bortner to be saying. What I understand her to be saying is we need to present the abolishment as an alternative to the Legislature as a workable one, but second, that we ought to go ahead and do work on this particular statute to try to fix it where it's unfair as best as possible.

So is that -- I don't know the moratorium issue is really something that is at issue now as it is the question of presenting to them that alternative as one of the things that the Commission recommends.

MS. NAPOLITANO: Peg, will you restate your motion?

DR. BORTNER: I very much hear what Mr. Johns and Mr. Bush have said and Justice Feldman. It may be more clear-cut to just accept that as a friendly amendment that it is a vote for abolishment of the death penalty and

it does not preclude discussion of other agenda items.

MS. NAPOLITANO: Wait, wait.

MR. BUSH: I would like to move to amend the motion, and the amendment would be that this body make the recommendation to the Legislature that the Legislature consider the procedural changes to -- for Ring, and that the Legislature also consider whether or not it may be in the best interest of the State to abolish the death penalty.

That doesn't mean that this body is voting to abolish the death penalty. We are making a recommendation in two parts, one for the procedural changes and to consider whether or not the death penalty should be abolished and the reasons why.

Now, I still believe that they're not going to abolish it. That at least they ought to consider referring it to the people because there are valid arguments for doing that.

So rather than a moratorium finding, you do two things: You make a recommendation for procedural changes; you ask them to consider the abolition of the death penalty.

MR. JOHNS: I accept that amendment.

SENATOR SMITH: Let me ask a question of that. You're making this two separate issues and not as a single issue, because I think if you abolish -- if you're making a motion to abolish the death penalty and including that as far as procedural changes that are necessary in order to implement the Ring decision, it's going to be confusing to the Legislature.

If there are two different issues -- these are the procedural changes that we recommend for the implementation of the Ring decision, and they can act on that. Then the second issue is if they want to make a recommendation to abolish the death penalty, and they can ignore that or do whatever they want with it which will not affect the procedural changes for Ring, then I think that can be done.

MR. BUSH: That is the essence of my motion. In other words, if I were there in the Legislature, I would probably vote because of these pending cases to adopt these procedural changes. I would also vote for a referendum to

submit this issue to the people whether they want the death penalty or not.

MS. NAPOLITANO: Go ahead, Lois.

MS. YANKOWSKI: I guess that my feeling about it is that the current and the pending cases are the ones that are going to cause such chaos in the legal system, and those are the ones that are going to result in endless litigation, and maybe it would be -- to do the other, say as to the current and the pending cases, we can't fix this problem created by Ring. We can't fix it in any reasonable way.

We relied on the United States Supreme decision of Walton, our Legislature did, and now they've changed course. We can't fix it. Let's commute all of those sentences to life sentences.

In the future after this Commission has completed its recommendation, go back to the Legislature, and they can consider whether they want to enact a constitutional death penalty with all the full participation of all the people here.

MS. NAPOLITANO: I don't think that is consistent with the motion on the floor, so I'm

going to say for the first time I think that is out of order. We have a motion, and I think we have a second to the Bush motion.

MR. JOHNS: Yes.

MS. NAPOLITANO: Any other discussion pertaining to the Bush motion?

MR. STOOKEY: I don't know how to vote -- and this is the point I am trying to make throughout.

I don't know how vote on procedural changes because I think what we've seen over the last two years suggest that there have been fundamental problems with the system we have, and we're not taking the time to evaluate whether the changes that we might be proposing make that better, make that worse or irrelevant.

So I reiterate my problem by saying let's go ahead and vote on the individual fixes. I don't know how to do the individual fixes at this point. I don't understand how to do that.

MS. NAPOLITANO: Perhaps you want to adopted the process that Justices Marshall and Brennan use and simply vote no on the

grounds -- I'm not being facetious -- on the grounds that you simply do not believe under any circumstance a procedure could be developed to make you comfortable with the death penalty.

I would like us to proceed to a vote on the Bush motion. All in favor of the Bush motion, please raise your hands, if I can count.

MR. CARDENAS: I'm in favor of the motion.

MS. NAPOLITANO: That's 11 in favor.

All opposed please raise your hands.

MR. UNKLESBAY: I'm opposed.

MS. NAPOLITANO: The motion carries by a vote of 11 to 8.

Here's what we're going to do. Now we're going to proceed to the five questions I proposed at the beginning. We will add as a recommendation of a divided commission that the Legislature would also consider referring a referendum to the ballot about whether the state should retain the death penalty to begin with.

Let's proceed to judge versus jury sentencing. The original question before the

body is: Do we believe the jury should impose the death sentence, and if it decides not to, it should revert back to the judge or should the jury make the decision of life versus natural life.

The earlier consensus was that once the jury decides it's not a death case, it should revert back to the judge just as any other first degree murder case would.

And I take it that that is the recommendation not only of APAAC but also of the trial subcommittee, and Judge Cole can I take that as a motion of the trial subcommittee?

THE HONORABLE JUDGE COLE: You may.

MS. LELAND: Second.

MS. NAPOLITANO: Any discussion on that motion?

MR. JOHNS: I have a discussion. That means if the jury does not recommend -- or excuse me -- cannot come up with a recommendation, it goes to the trial judge, and he can only recommend life.

MS. NAPOLITANO: It means if the jury does not recommend the death penalty, it would

go back to the judge to decide whether it is 25 to life or natural life. Do the sentencing.

This does not involve the bounceback. That's a separate motion.

MR. CARDENAS: Does this pick up or address all the points John made?

MS. NAPOLITANO: Which point.

MR. CARDENAS: About having the judge review or [unintelligible].

MS. NAPOLITANO: It does not. We can take that up as a separate matter.

Let's take a vote. All in favor say aye.

(Chorus of ayes.)

MS. NAPOLITANO: Any opposed?

MS. YANKOWSKI: I abstain.

MS. NAPOLITANO: There was a discussion -- and I think it was you, John -- about allowing the judge -- if the jury imposes the death penalty allowing the judge to reverse that decision.

Do I have it right?

MR. STOOKEY: Yes.

MS. NAPOLITANO: That's when Dr. Bortner started with some of the data.

MR. AHLER: I'm confused as to what standard the judge is going to apply. Does the judge have to find error, or does the judge sit as the 13th juror and makes their own decision.

MR. STOOKEY: That, again, is an issue that we need to study this question. We need to see what other states are doing. We need to understand that question.

I don't have a ready answer other than saying Colorado, Illinois and other states have said that the judge can -- from my perspective it would be an independent reweigh.

MR. AHLER: If that's the case, then you can have the trial judge doing an independent reweigh, and if you keep independent review for the Supreme Court and you have them doing an independent. At what point does the jury actually get to make the decision here?

Traditionally, in our criminal justice system they make these choices. So I think that's an important issue for this motion, and I think it's very confusing the way the motion is drafted or stated.

MR. UNKLESBAY: Madam Chair?

MS. NAPOLITANO: Yes, Rick.

MR. UNKLESBAY: Thank you. I agree with Paul. If we're going to allow the jury to make the decision, why not allow them to make it? Would the judge not have the power of -- the equivalent of a Rule 20 for a directed verdict if the State failed to prove there are aggravating factors at the end of the State's aggravation hearing. Isn't that where the judge's power should come in rather than allowing the jury to make the decision and then having one person take that decision away from them.

So for those reasons I would oppose having the judge do a reweighing.

MS. NAPOLITANO: All right. Any other comments? All in favor of allowing --

MR. STEIN: I want to be clear on what we're voting on. I think I missed the last one.

MS. NAPOLITANO: You better know what you're voting on.

I think the issue we're voting on -- and let me see if I'm stating it fairly -- does the Commission believe that the trial court

after the death -- after the jury has found for the death penalty, that the trial court should have the ability to reverse that finding.

Is that accurate?

MR. STOOKEY: That's accurate. It's not part of my motion that it be necessarily some type of de novo review.

It's simply our expression of our belief that the judge should have that duty. I think we should look carefully at what the standard should be.

MS. NAPOLITANO: Does everybody understand that?

JUSTICE FELDMAN: I hate to complicate that subject. Now we're getting into the problems -- part of the problems that I was talking about earlier.

Under Arizona law there are two standards, one, the so-called 13th jury standard that the judge may set aside a verdict if it's against the weight of the evidence, and the other is that the judge may set aside a verdict if the evidence was insufficient to support the verdict.

And there are two U.S. Supreme Court

cases that one. Burkes versus The United States and the other is so-called Tibbs rule. Under the former you can retry the defendant. Under the latter you cannot because double jeopardy applies.

I'm not going to recommend -- I don't think it's my function to make recommendations here. Those are the issues before -- on these kinds of issues, I don't think it's my function to make recommendations, but I think the committee ought to understand the two problems.

It has always been the purview of the trial judge to set aside a verdict if it's against the weight of the evidence in all criminal cases, and it's been the trial judge's duty to set aside the verdict if the evidence is insufficient to support it.

If you want to adopt a separate rule or a different rule for capital cases, that's fine, but at least you have to decide that issue. Do you want to do that or not? Do you want to take from judge's in this one limited type of case -- from trial judges their ability to set aside a verdict if it's against the weight of the evidence, and do you think that's

better for the system of justice or not?

MS. NAPOLITANO: Are you agreeing with what I think Paul Ahler and Rick Unklesbay were saying, which is we don't need this because there is already Rule 20 in place, and we don't need this, and there is also independent review by the State Supreme Court.

JUSTICE FELDMAN: I'm not agreeing or disagree. I'm saying there is more of an issue than just a simple insufficiency of the evidence rule. In other words, you have to decide if you want to do -- in this type of case, do you want to do away with the rule that applies in every other case, civil or criminal, that the judge may set aside a verdict if it's against the weight of the evidence.

MR. JOHNS: That was why I read before the Colorado provision. If we were to do -- to keep it as it is now with Rule 20, I think Rule 20 would have to be changed because of the way the wording is.

The Colorado statute provides in the event the jury's verdict is to a sentence of death, such verdict shall be unanimous and shall be binding upon the court unless the

court determines and sets forth in writing the basis and reasons for such determination that the verdict of the jury is clearly erroneous and is contrary to the weight of the evidence in which the case the court shall sentence the defendant to life imprisonment.

So that's the change I was trying to suggest earlier, that was the equivalent of Rule 20, but making sure that it was in the death penalty statute. So that sets forth.

I don't know, Justice Feldman, whether that falls under the 13th juror or the second standard of review. That sounds like it's clearly erroneous against the weight of the evidence, it would be number two.

VOICE ON THE PHONE: My concern with the sentence of the juror and with the Colorado statute is that -- less than the Illinois approach -- is that it doesn't adequately address residual doubt or mitigating factors and I would be favor of the Illinois approach.

JUSTICE FELDMAN: You don't need a statute with respect to the evidence is insufficient to support the verdict. The due process clause means that if the evidence is

insufficient to support the verdict, take the case to the jury, then the judge must dismiss it, and double jeopardy prevents retrial. That's what the U.S. Supreme Court says. That's the rule.

That's the rule we've followed for 50 years, ever since they said it -- or 25 years, whatever. Until they change that one, too, we're stuck with that one, or we have the benefit of that one, whichever way you want to put it.

You don't need a statute to deal with that. What you do have to deal with is the question of the weight of the evidence, which is a different rule as I explained earlier.

MR. STEIN: I know there is a motion on the table, and I'm not sure procedurally how to do what I would like to do. I'm uncomfortable on voting on each one of these specific recommendations, because I think as a Commission we don't understand them well enough.

What I would like to vote on the APAAC proposal up or down, whether this Commission supports the proposal or if the Commission does

not support it.

We've made the first recommendation, and I think that is better approach to take. If I need to wait until this is over, and make that as a motion, I'll do that. If I can amend what we're doing now and offer it now.

MR. AHLER: That would certainly simplify the procedure here.

MS. NAPOLITANO: You all are getting restless out there. I'm perfectly willing to do that, if we want to get to the bottom line.

Does anybody know what the APAAC proposal is.

MR. BUSH: Well, I have a question. If you vote that way and you vote it down, then what are we sending to the Legislature? Nothing?

MS. NAPOLITANO: That's why I was going the other way, to take the basic points in the APAAC proposal and see if we could reach a consensus. That would assist the Governor and the Legislature in terms of what they intend to do.

If the Commission, as a majority, says, "I don't like the APAAC proposal," to be frank,

the APAAC proposal is going to be introduced.

I mean, the question for the Commission -- you ought to think about this for yourselves, and some of you have pretty strong views -- that if you don't think anything will fix Ring or that anything will fix the death penalty, a view that I respect, others of us -- there are others of the Commission have views that Ring a procedural matter that at least for special session ought to be dealt with as a procedural fix.

And APAAC has put a procedural fix on the table. And the procedural fix is pretty much as we've voted on in terms of jury sentencing and bouncing or having it go back to the judge if the jury finds no death.

The APAAC proposal does not have an independent review by the trial court. The APAAC review has multiple bounceback provisions, not just one bounceback. And the APAAC provision would amend the Supreme Court standard of review to abuse of discretion from independent review.

MR. CARDENAS: I don't agree that the APAAC proposal is procedural. Having said

that, we should address the major points. I think it would be benefit of benefit to the Legislature.

MR. JOHNS: Judge Cole hasn't finished his report.

THE HONORABLE JUDGE COLE: I'll live.

MS. NAPOLITANO: Let's keep moving on. I'm going rule your motion out of order, Lee. At the end you can decide if APAAC doesn't make the changes you thought it should make you could oppose that.

Judge Cole?

THE HONORABLE JUDGE COLE: No, not now.

MS. NAPOLITANO: Jim?

MR. BUSH: I have a question on the issue. The jury has found that the defendant guilty of the crime, and they have heard the aggravation phase, and they have found there is an aggravation factor, and they've heard the mitigation phase, and they have determined that they want death.

So if I understand Justice Feldman, he's saying that what we're going to consider here is not the conviction of whether or not guilty, but whether or not they proved that

there is sufficient weight on the aggravation side. We're not determining whether or not he killed the guy. He killed them. But was there an aggravation factor and whether the judge can overrule them on the aggravation and mitigation phases. Right?

MS. NAPOLITANO: That's the way I hear it.

MR. STEIN: I move to table this motion.

MR. AHLER: I'll second it.

MS. NAPOLITANO: There is a motion to table the motion. Procedural vote.

All in favor of tabling, please raise your hand. This would be to table the motion -- this would be to table the motion that there be basically an ability for the trial judge to override the jury. All in favor of tabling this motion, please raise your hands.

Six in favor.

All opposed please raise your hand.

Eleven no, and one abstention.

Let's proceed with discussion on the motion, and let's see if anybody has anything

else they wish to say that no one has said before.

MR. AHLER: Just a clarification. It's my understanding that the jury does currently -- the judge currently does have the power to overturn the jury verdict of guilt if the judge feels there is insufficient evidence to support the verdict. That would also apply to the finding of death and aggravation and mitigation.

So I'm not exactly how we're changing here. Are we have asking for a different standard than that? Is that what the motion is asking for?

MR. STOOKEY: The motion is asking to consider that issue and look at it in light, as Jose Cardenas said, that the Illinois standard, which is, in fact, a different standard. It is a standard that says that in the context of sentencing of a capital case, the judge should have a role and a responsibility to look with regard to residual doubt and other factors as a check upon what the jury is doing.

Again, what the language ought to be, I think I'm asking that this be referred back to

a committee to look at. I don't know what the language ought to be.

MS. NAPOLITANO: I think, Paul, if I might, what you're suggesting is that this is really -- that in your view the current law would already allow a judge to overturn a jury's finding of death if it found it is not supported by the evidence. Therefore, this would be an unnecessary step. Do I have it right?

MR. AHLER: Yes. It sounds like what John is proposing is an independent review standard similar to what the Supreme Court currently conducts in capital litigation.

MR. STOOKEY: What I'm proposing is that we evaluate the question to decide in light of what other states around the country are doing, whether we think an additional step is appropriate here.

MS. NAPOLITANO: I think we have the parameters of the discussion, at least so we can get a sense of the Commission.

All in favor of John's motion, which would allow the trial judge to override a jury sentencing of death, leaving aside the question

about what standard he would employ, all in favor of that, please raise your hands.

That's ten.

All opposed? And the chair opposes ten to ten. Fails on a ten to ten vote, and it's one abstention.

Next issue is the bounceback provision. The APAAC provision has two or three -- Paul, can you help us here?

MR. McMURDIE: It allows for an automatic reimpanelment in each phase of the proceeding.

MS. NAPOLITANO: What is the recommendation of the trial committee?

THE HONORABLE JUDGE COLE: I believe it's one bounceback.

MS. NAPOLITANO: Can you explain to the Commission how that would actually work in practice?

THE HONORABLE JUDGE COLE: No. I don't know.

John, do you know?

MR. STOOKEY: No.

THE HONORABLE JUDGE COLE: Let the record show that John and I agree on something.

MS. NAPOLITANO: If I might, I think what it means is that if the jury cannot reach a verdict at the sentencing phase, then the prosecutor, as a matter of right, can call for the impanelment of a second jury, but then if the second jury cannot reach a verdict of death, then the sentence would go back to the judge for sentencing on life, natural life.

Do I have that accurately?

MR. JOHNS: That's right.

THE HONORABLE JUDGE COLE: That's right.

MR. JOHNS: The discussion at the committee was whether two or three bouncebacks were necessary if one bounceback -- the feeling was, and I think eventually some of the prosecutors came over to reexamine the view, that if they couldn't get it after one bounceback, that that was sufficient, and it ought to go to the judge rather than use numerous other juries and put the victims and everyone else through this as well as cost. It's really giving them one.

MS. NAPOLITANO: One bounceback means two juries.

MR. JOHNS: Rather than two bouncebacks.

MS. NAPOLITANO: Two bouncebacks means three juries.

MR. HASTINGS: My understanding was that there would be one reimpanelment as a matter of right, and then after that it would be at the discretion of the court.

MS. NAPOLITANO: That was not my understanding, because that would permit for three bouncebacks or two bouncebacks. My understanding was that the trial committee was looking at one bounceback.

THE HONORABLE JUDGE COLE: I know we debated this, and I think -- Diane, do you recall exactly?

MS. SAUNDERS: It was my understanding as well that it was one bounceback.

THE HONORABLE JUDGE COLE: That's what I thought.

MS. NAPOLITANO: George?

MR. WEISZ: We're talking about one bounceback in each phase or each stage?

THE HONORABLE JUDGE COLE: Yes.

MS. NAPOLITANO: Steve?

MR. TWIST: On that point, Madam Chairman, I would like some clarification from Mr. McMurdie.

I'm looking at Page 11 of the APAAC proposal in Subsection E. It says, "If the trier of fact is a jury and the jury is unable to reach a verdict regarding whether one or more of the alleged aggravating circumstances has been proved and does not reach a verdict that all of alleged aggravating circumstances has not been proved, the court shall dismiss the jury."

My question is is that language being written in the context of determining whether one or more of the alleged aggravating circumstances, that necessarily ties you back into the proceeding where the jury does that, and that is the first of the two sentencing phase proceedings, isn't it?

And what does that suggest, then, with respect to the -- I guess what the statute calls the penalty phase if the jury is unable to reach a verdict at the penalty phase?

That's an issue that came up, and I thought there was some discussion afterwards,

and it would help me to clarify what the intent was because I'm uncertain.

Do you understand my question, Madam Chairman?

MS. NAPOLITANO: I'm not sure I does. Maybe Mr. McMurdie does.

MR. McMURDIE: I do not.

MR. TWIST: Is Subsection E limited to the circumstance where the jury is unable to reach a verdict at the aggravation, mitigation -- at the aggravation proceeding phase.

THE HONORABLE JUDGE COLE: Yes.

MR. TWIST: What is the consequence if the jury is unable to reach a verdict at the penalty phase?

THE HONORABLE JUDGE COLE: Same thing under G.

MR. TWIST: Then it's four different -- as Mr. Stookey pointed out in the meeting, in the committee meeting, there are really four different possible impanelments.

THE HONORABLE JUDGE COLE: Right.

MR. STOOKEY: Mr. McMurdie, can you confirm of that, Paul.

MR. McMURDIE: I'll refer to it as the California system. Under the California system if there is a hung jury at the aggravation phase, there is an reimpanelment of a new jury. If that jury find an aggravator, it goes to the penalty phase, and if that jury becomes hung, there can be another reimpanelment. So that would be three.

MR. STOOKEY: There could be four separate juries?

MR. McMURDIE: Under the discretion of the court, there could be as many as -- it goes on forever.

MR. STOOKEY: Four at the request of the prosecutor.

MR. McMURDIE: Three.

MS. NAPOLITANO: Paul, you have really confused me. Let me walk through the scenarios. Jury convicts defendant. Jury hears aggravating evidence in the sentencing phase. Under E, jury is unable to reach a verdict that one of the aggravators has been proved beyond a reasonable doubt. A new jury could be impaneled?

MR. McMURDIE: That's correct.

MS. NAPOLITANO: Jury reaches a unanimous verdict that aggravator has been found, but unable to reach a verdict as to whether the death penalty should be imposed. New jury could be impaneled?

MR. McMURDIE: That's correct.

MS. NAPOLITANO: Then at that point the prosecutor, as a matter of right, would be able to ask the court to impanel a new jury, correct.

MR. McMURDIE: Not after the first one.

MS. NAPOLITANO: Only after the decision on non-death -- or hung on death?

MR. McMURDIE: Right.

MS. NAPOLITANO: At that point the prosecution gets one chance to reimpanel a jury.

MR. McMURDIE: Correct.

MS. NAPOLITANO: What happens if that new jury hangs under the APAAC proposal and under the trial court committee recommendation? How would you interpret that?

MR. McMURDIE: It's discretionary with the courts as to whether to impose a life sentence or impanel a new jury.

JUSTICE FELDMAN: May I inquire, Madam Chairman, of Mr. McMurdie whether the California Supreme Court system -- the California system on this point has upheld by the United States Supreme Court? And I ask that question again to try and bring closure to some of these things because the U.S. Supreme Court has held on several occasions that the double jeopardy clause entitles a defendant to resolution of a criminal trial on all of the issues in that trial by the jury, which is originally impaneled, and that the impanelment of separate -- of subsequent juries violates double jeopardy.

I don't think they've ever approached the question of whether a jury, which hangs on one issue of a multi-issue trial is an exception of that clause or not. If they have, I'm unfamiliar with the decision, and again, we are, without much consideration, about to build another U.S. Supreme Court issue into the new sentencing procedure.

And we may want to do that. I take no position whether you should or shouldn't do it. I only suggest that you ought to think about it

before you do it.

MR. McMURDIE: The California procedure has been upheld by the California Supreme Court. Other states that have hung jury provisions, those procedures have also been upheld, and I would also point out the Fifth Circuit has upheld the federal government's position in the penalty phase if the jury is hung to reimpanel a jury.

JUSTICE FELDMAN: That leaves the question open as to where the U.S. Supreme Court going to go, just as it did with Aprendi.

MR. BUSH: On the aggravation factor, it is clear that you need a unanimous verdict on the aggravation factor. You do not need a unanimous verdict on mitigation.

So I don't see where you come to the second jury on the mitigation phase because on Page 3, it says the jurors need not unanimously agree. So if you have nine to three and they agree, you don't have to have a new jury.

MS. NAPOLITANO: I believe, Jim -- I think the jury also has to agree unanimously that the aggravator outweighs the mitigator. That is the second phase where you can have a

hung jury. You can have a jury rule unanimously on an aggravator but still hang on whether the death penalty outweighs the mitigators.

Where is Judge Cole? Judge Cole has surrendered.

Now, does everybody understand the trial court recommendation and how it differs from the APAAC recommendation?

MR. STEIN: No.

MR. AHLER: Could you state it one more time.

MS. NAPOLITANO: The APAAC recommendation would allow one bounceback. The current APAAC -- Paul? -- would allow two bouncebacks, I'm sorry, and would retain in the trial judge the discretion to order a subsequent bounceback at the trial judge's discretion.

The trial court subcommittee of this Commission's recommendation would allow for one bounceback, and it does not retain as I understand it the ability at the trial judge's discretion to have a second bounceback.

Does everybody got that now?

MR. CARDENAS: So is the motion the trial court recommendation versus APAAC, or does it deal with the situation of no bounceback at all?

MS. NAPOLITANO: The motion on the floor is to approve the trial court recommendation.

MR. CARDENAS: If you don't think there should be any bounceback, where do we deal with that?

MS. NAPOLITANO: I think you need to make a motion.

MR. CARDENAS: I would so move.

MR. KIMERER: I would second the motion.

MS. NAPOLITANO: Motion on the floor. Mr. Stein.

MR. STEIN: That was exactly my question.

MS. NAPOLITANO: Okay.

DR. BORTNER: As I listened to the trial subcommittee the other day, my reflection on it was if the APAAC is to in some ways to advocate jury decision making in agreement with the Ring decision -- whether or not this is

intuitively comprehensible by citizens, the whole bounceback and multiple bounceback seems to me to be almost incomprehensibly inelegant.

If citizens are now to say the jury will make a decision on the death sentence, a jury decides, and if the jury believes that the death sentence should be imposed, then it will impose.

I think we undermine to a great extent whether or not the citizens of Arizona and hopefully the Legislature reflecting those citizens, whether or not they will find this proposal culpable at all.

The bounceback seems to be the least comprehensible in terms of citizen perspective on this. I think the subtrial committee's attempt to say at least limit it to one, that citizens would say, "Well, there is one more go at it," but I concur with the people who feel like if it is a jury decision, the jury makes the decision or not in terms of death, and there are no bouncebacks.

MS. NAPOLITANO: Anybody want to respond to that?

MR. LeCLAIRE: I think the problem with

that is you're not getting a jury decision. That's in essence the level we're dealing with. The jury taking no position or hanging is not a decision, so you're attempting to come to some resolution in this process one way or another, up or down.

And then the question becomes how many times should the defendant be exposed to that up and down vote. And the proposal from the trial committee, as I understand it, is a single additional time, whereas the other proposal has the possibility not only of two, but at the discretion of the court even more.

MS. NAPOLITANO: The motion on the floor.

MR. WEISZ: I'm sorry. To the chair of the committee, my understanding was that the trial committee proposal was one; that the prosecutors could ask or can be reimpaneled, and then there is still discretion for the judge to do one more?

THE HONORABLE JUDGE COLE: No more discretion, as I understand it.

MS. NAPOLITANO: It's a pure bounce, one bounceback.

MR. HASTINGS: I would like to say for the record that my understanding of what we were discussing at the trial committee meeting was one bounceback, no other change, and the APAAC proposal, which would then allow the judge to either have discretion to reimpanel a second jury or to go ahead and sentence.

MR. WEISZ: Madam Chair, that is where the confusion might be.

MS. NAPOLITANO: Well, let me suggest that we proceed this way: The motion on the floor is to not have any bouncebacks. In other words, if the jury hangs on sentencing, that's it. It goes to the judge for life, natural life determination.

The trial court recommendation, as it's been reported -- and I understand there may be miscommunication in there -- is that there is a bounceback with no possibility for another bite at the apple.

The APAAC recommendation would provide for two bouncebacks plus an additional one at the judge's discretion.

Steve?

MR. TWIST: Madam Chair, the so-called

one bounceback, is that one at the aggravation stage and one at the penalty phase, so it's really two?

MS. NAPOLITANO: I think it would depend when it got hung.

MR. TWIST: Right. When you say one, it really could be two?

MS. NAPOLITANO: If they hang on finding on the aggravator, they're not even going to get to the weighing of the case.

THE HONORABLE JUDGE COLE: Eventually.

MS. NAPOLITANO: Not that jury.

MR. TWIST: Not that jury. They could hang again.

MS. NAPOLITANO: There are two places they can hang in a sentencing under the statute.

All right. Everybody with me?

MR. BUSH: I don't know.

MS. NAPOLITANO: The motion on the floor is that there be no -- that this Commission recommend no bounceback provision whatsoever. All in favor of that motion, please raise your hands.

MR. CARDENAS: I support that.

MS. NAPOLITANO: Ten in favor.

All opposed, please raise your hands.

MR. UNKLESBAY: I was on mute. I'm opposed.

MS. NAPOLITANO: Nine opposed, and the Chair is opposed. The motion fails on a ten to ten vote and the justice abstains.

Now we go to the question of the single bounceback. This is the recommendation of the trial committee.

MS. YANKOWSKI: Was that ten to nine?

MS. NAPOLITANO: It was nine until I voted.

MS. YANKOWSKI: But you don't get to vote. I thought we were following parliamentary procedures.

MS. NAPOLITANO: Kind of.

All right. The vote is on the motion of the trial committee with Judge Cole that there be one bounceback, which I will call a clean bounceback with no option for anything else. Is that it?

MR. TWIST: One at each stage?

MS. NAPOLITANO: As explained earlier in the meeting. By the way, we are

transcribing this meeting, so everybody can make sure we're accurate.

Mr. Bush?

MR. BUSH: I would like to separate the motion. I favor one bounceback on the aggravation, because I understand that is considered an element of fact. And therefore, the jury is a fact-finder. And to me, it's no different than finding guilt. If you've got a hung jury on guilt, you've got a right to retry the guy.

If you have a nonfinding on a factual thing on aggravation, one bounceback I vote for. No more.

Now, when you come to the penalty phase, if the jury votes against the death penalty, then I don't want any bounceback. That's my position.

MS. NAPOLITANO: It's not that they vote against it. It's that they hang.

MR. BUSH: They hang? Then I don't think there should be a bounceback on the penalty phase. I would like to separate the issues, aggravation and penalty.

MS. NAPOLITANO: Is the Commission

acceptable to doing that? I've got no problem doing that.

All in favor of having one bounceback on the aggravating factor provision, please raise your hands. This would mirror the trial committee's recommendation for that phase.

Eight in favor. Is there anybody on the phone in favor?

MR. UNKLESBAY: Madam Chair, this is a vote on what, now?

MS. NAPOLITANO: The issue is, do you vote in favor the trial committee's recommendation that if a jury hangs on finding an aggravating factor, there shall be one bounceback and no more.

MR. CARDENAS: That's opposed to the APAAC recommendation [unintelligible].

MS. NAPOLITANO: Yes.

MR. CARDENAS: Then I vote in favor.

MS. NAPOLITANO: That's nine.

MR. UNKLESBAY: This is Rick Unklesbay. I'm in favor of the trial committee's recommendation.

MS. NAPOLITANO: Okay. That will be ten. All opposed raise your hand.

That passes.

MS. NAPOLITANO: If you abstain, raise your hand. Five abstentions, if I'm counting accurately.

The second motion is Mr. Bush would amend the trial court's recommendation, saying if at the weighing phase, weighing the aggravators against the mitigators, the jury hangs on whether to impose the death penalty, there will be no bounceback at all.

MR. BUSH: Right.

MS. NAPOLITANO: Everybody understand the Bush motion?

All in favor please raise your hand.

MR. CARDENAS: I support it.

MS. NAPOLITANO: Nine in favor. All opposed please raise your hand.

MR. UNKLESBAY: This is Rick Unklesbay. I oppose.

MS. NAPOLITANO: Nine opposed and the justice abstains.

MR. STEIN: I abstains.

MR. CARDENAS: Did you get my vote in favor.

MS. NAPOLITANO: Can we recount that?

Maybe somebody can help me with the count. Diane?

All in favor of the Bush motion, which would say that if the jury, in weighing aggravators and mitigators gets hung on the death penalty, there shall be no bounceback whatsoever. All in favor, please raise your hands.

MR. CARDENAS: I'm in favor.

MS. NAPOLITANO: I got nine in favor.

All opposed to please raise your hands, and Rick you're opposed.

MR. UNKLESBAY: I'm opposed.

MS. NAPOLITANO: Nine opposed. So it fails on the tie vote, and the justice abstain.

MR. STEIN: I abstain, as well.

MS. NAPOLITANO: Mr. Stookey abstains. Now, that motion having failed, we'll return to the trial court recommendation, which is if at the weighing phase of the aggravators and mitigators, the jury cannot reach a verdict and hangs, there shall be one bounceback.

Did I state that accurately? I think I did. Everybody got me? Everybody with me?

Mr. Twist?

MR. TWIST: Is it another way of saying that the only change, the effect of the proposal is the judge's discretion is eliminated? APAAC allows one and then more in the judge's discretion, so the effect of this is to eliminate the judge's discretion to allow for continuing. Isn't that correct.

THE HONORABLE JUDGE COLE: Yes.

MS. NAPOLITANO: I thought the APAAC proposal had an additional bounceback to start with, but it would certainly eliminate the judge's discretion.

All in favor of the trial court's recommendation, please raise your hands.

MR. CARDENAS: Janet, I vote in favor of the question, this one versus the APAAC recommendation.

MS. NAPOLITANO: All in favor of the trial court recommendation, please raise your hands. Hold them up high, please. And Jose, you're a yes?

MR. CARDENAS: Yes.

MS. NAPOLITANO: I count eight yeses.

All opposed, please raise your hands.

MS. NAPOLITANO: Four opposed, so the

recommendation passes, and there is one abstention.

MS. YANKOWSKI: Two.

MS. NAPOLITANO: Anybody abstaining, please raise your hand.

Six abstentions. Thank you very much.

MR. STOOKEY: Madam Chairman, some people have left, and I at least am finding it very difficult to figure out how to vote on this and how this is proceeding and the issue of whether we're giving this thoughtful consideration. I would like to, therefore, move for adjournment.

MS. NAPOLITANO: We've only got two more questions to go, and I think George is right, and I think the Senator is right. This train is leaving the station. I think if this Commission wants its views heard, it better do it today.

MR. STOOKEY: I think for the record, Your Honor -- I'm thinking of him. I object to the process.

MS. NAPOLITANO: I understand.

MR. STOOKEY: I don't think we can intelligently vote on this.

MS. NAPOLITANO: I appreciate your view.

The next issue is the standard of review, and the recommendation of the trial court subcommittee was -- first of all, the recommendation of APAAC, would be it would be an abuse of discretion of the factual findings of the jury in sentencing, which be consistent with typical standard of review of findings of fact.

The recommendation of the trial committee is that we retain independent review by the Supreme Court.

Is that correct, Judge Cole?

THE HONORABLE JUDGE COLE: I believe so. At the time we met Wednesday, we only had eight of the surveys back, and six said independent review should be retained, and I believe that's the way the committee voted, if I'm not mistaken.

MS. NAPOLITANO: That's the word I got back.

Does anybody want to have a discussion on this.

DR. BORTNER: Just to point out the

salmon handout is the result of the request from the subcommittee on Wednesday.

MS. NAPOLITANO: We're not mentioning Salmon here.

DR. BORTNER: What the subcommittee suggested was that we should look at what were sentence-related remands since 1990. That arbitrarily chosen.

At the time it was thought that perhaps a more time sensitive or change sensitive date might be looked at.

But these are the 25 defendants who received sentence-related remands or modifications during that ten-year period of the data.

Fifteen were based on the reweighing of factors, the independent review, Arizona Supreme Court. What we've done is provide the aggravating factors that resulted in the death sentence, the issues that resulted in the Supreme Court's modification or remand and then the outcome.

There were ten additional defendants who received remands. These were based on ineffective assistance of counsel, six;

improperly excluded evidence, one; improper trial court ruling, one.

There was one in which there were two issues, improper trial court ruling and prosecutorial error. And one was classified as an other due process procedural issue.

I would like to speak as a commissioner in favor of retaining and support the subcommittee's report. I've learned a great deal over the last two years about the decision-making in this process.

I think it would be ill-advised to disregard the enormous experience and the collective consideration of the Supreme Court. Justice Feldman has spoken today on the larger issue.

I've had the privilege of having a now Justice Ryan serve as a member of the data subcommittee. No one has been more attuned and interested and concerned and vigilant about learning about the death penalty sentencing process. I think it would be absolutely lamentable to lose the independent weighing by the Arizona Supreme Court.

MS. NAPOLITANO: Would anybody else

like to make a comment on this issue?

THE HONORABLE JUDGE COLE: I may be the only one at the table that has actually had to look at somebody in the eye and sentence them to death. It's always been a great comfort to me to know that there is another court and five people smarter than I am in most cases to review to my decision.

I, like Peg, think it grave error to reverse to a clear abuse of discretion standard.

MS. NAPOLITANO: Anybody else have a comment they wish to make? The motion on the floor is the recommendation of the trial court subcommittee that the independent review by the Supreme Court be retained. All in favor, please indicate by raising your hands.

MR. CARDENAS: I'm in favor.

MS. NAPOLITANO: I count eleven in favor.

All opposed, please raise your hands.

MR. UNKLESBAY: Rick Unklesbay. I oppose.

MS. NAPOLITANO: Six opposed.

Any abstentions? Two abstentions.

So that recommendation passes.

Now, the last issue we had determined was -- we wanted to focus on was when and how the victim impacts statement could be made and at what stage in the proceedings, and is there -- what is the recommendation of the subcommittee, Judge Cole?

THE HONORABLE JUDGE COLE: Could Mr. Johns speak on that?

MR. JOHNS: Yes. As I look back the concern I have is the audiotape, videotape. And the way that the APAAC proposal changes this is makes it so that now it would go directly to the jury.

But if you look at the old statute the way it was written the audiotape, videotape statements went to the presentence rider, and so, to me, this is a big difference.

Now, I realize will may not be a presentence rider now, but however, I am very concerned about the procedural issues that will happen in trial when statements come out, particularly those that may be audiotaped or videotaped and new information is divulged, and there may need to be a reason to stop the trial

for an investigation of that information.

So it seems to me that some further evaluation of this has to be made about when is it going to be produced in terms of discovery-wise.

MS. NAPOLITANO: Could you tell us what section you're looking at?

MR. JOHNS: It would be Page 2, renumbered Section C, about the middle of the page, it says, "The victim may submit a written audiotape or videotape impact statement."

If you look at how the language was done, those statements went to the presentence report for the probation officer's use in preparing the presentence report.

So that's quite a bit different than what we had before, so I think this is a real problem and needs to be addressed in some way.

Either these folks have to be under oath as witnesses and/or they have to, I think, have a process where after those things are submitted to the jury, they have an opportunity to make an impact statement only in the capital cases.

MS. LELAND: I disagree in that

although they were provided to the presentence investigator, they were then provided to the court, and played in court whether audiotape or videotape for the judge or for the trier of fact.

MR. JOHNS: And the difference I would say now is now you have a jury doing it and not a judge, and before we presumed that the judge would be able to separate out this prejudicial material or at least the judges always said they could.

I'm not so sure that the jury will be able to separate out that prejudicial material and what kind of instructions will be given, and most importantly, what happens when inappropriate information does come out, it's objected to and perhaps you're risking a mistrial or information that needs to be immediately somehow investigated, and defense counsel won't have the opportunity to do so.

So those are my concerns. It is a big change on how it was done before, and its immediacy makes it much more dangerous in terms of the fair trial.

MR. TWIST: I just want to add that we

have to be mindful, of course, of the constitutional requirement that in order to preserve and protect the victim's right to due process, the victim has a right to be heard at any proceeding involving sentencing.

The way this is structured, it sounds to me like that is two proceedings, the first one, the aggravation phase, and the second one the penalty phase.

It is unclear whether or not in those circumstances where the judge is going to decide between life or natural life whether that would be at a third proceeding, but I certainly am an advocate for protecting the victim's right to be heard at each of those proceedings whenever there is a proceeding. I think the Constitution requires it.

And so I would support the APAAC proposal, but I would add to it language that would protect the victim's right at those three stages.

And I'm curious -- and maybe Mr. McMurdie would help out on this -- in those -- in California -- let me ask the question this way: In California, at the

aggravation phase -- I'm sorry -- at the mitigation phase, are members of the defendant's family, are they sworn in when they make statements in court at the penalty phase, or do they simply make statements like now happens before our judges?

MR. McMURDIE: I don't know the answer to that.

MR. JOHNS: That, again, kind of underscores how we are operating in uncharted waters when we don't have answers to those kind of basic questions and yet we want to put this information in the statute.

Again, I'm sure that's my concern and Justice Feldman's concern, that if you make this a statutory requirement, and it turns out to be not meet the constitutional muster, we're developing a problem.

MS. NAPOLITANO: As I read the APAAC proposal, what it did was incorporate at the aggravating part of the sentencing the Payne versus Tennessee requirement that the victim could not recommend a sentence but could discuss the impact of the crime on him or herself or her family, and then --

But for the nondeath penalty parts of a crime, if there are multiple charges or what have you, that the jury could hear everything that the victim has to say.

Do I have that right?

MR. McMURDIE: It wouldn't be the jury; it would be the judge.

MS. NAPOLITANO: Yes, the judge.

MR. TWIST: Let me say on the Payne point, I continue -- I think I may be the only one on the Commission, but I continue to voice strong opposition to the conclusion that Payne can be read to prohibit a victim in a death penalty case from offering an opinion about what the sentence ought to be.

There are states, just came back from the NDA meeting in the Bismarck, North Dakota, and confirmed, for example, in Oklahoma -- the law in Oklahoma decided by the Oklahoma Supreme Court is that a victim may offer without elaboration an opinion on what the sentence ought to be. And that's whether the victim supports the death penalty or whether the victim opposes the death penalty. They have a right to do that.

I would hope that we would let the law -- and I asserted this position in connection with the rules when we talked about those, as well, but now in connection with this statute.

I would hope that we would let the statute be silent on this point, so that the law can develop in a deliberate way on the question and not preclude the development of that law by a premature enactment in statute.

MR. JOHNS: Is that the recommendation, to take that language out?

MR. TWIST: So moved.

MS. LELAND: And I second.

MS. NAPOLITANO: Let me see if I understand where we are. The trial committee, basically, on the victim impact stuff, endorsed the recommendations or the APAAC proposal, correct?

THE HONORABLE JUDGE COLE: There was a lot of discussion, though, about disclosure, about preliminary disclosure if we're talking about audiotapes and videotapes. That's not something that has come up today, curing some of this concern by way of simple disclosure

rules.

MR. AHLER: Madam Chairman.

Judge, wouldn't that already be handled by existing rules of discovery, that they would have to provide a copy of the videotape to the defense. If there were objectionable material they could make an objection, I guess, before the material gets to the jury?

THE HONORABLE JUDGE COLE: Arguably, but I think there was a concern that we make it clear that it applies in this circumstance, but arguably Rule 15 does deal with it.

MS. NAPOLITANO: The motion on the floor is to amend -- restate the motion, Steve.

MR. TWIST: Well, I was following Chris' recommendation, I think, on Page 2 in subsection newly lettered C, the sentence, "The trier of fact shall not consider any recommendation made by the victim or anyone else regarding the sentence to be imposed but shall consider the recommendation by the defendant or the State be stricken."

I think the recommendations by the defendants and the State are already going to be considered.

MS. NAPOLITANO: Everybody understand the motion, and the second is by you, Chris?

MR. JOHNS: I'm very uncomfortable. I need to think about this.

MS. NAPOLITANO: Any discussion on the motion before we go to a vote?

All in favor of the motion, please raise your hand.

I count eight yeses.

All opposed, please raise your hands.

Six opposed -- seven opposed.

MR. HIGGINS: I'm abstaining.

MR. CARDENAS: I'm abstaining.

MS. NAPOLITANO: Rick, are you still there?

MR. UNKLESBAY: I'm sorry. Somebody came in. Let me abstain because I missed part of the discussion. I apologize. Somebody came in.

MS. NAPOLITANO: So what is the count?

MS. SAUNDERS: Eight, six and three abstentions -- four abstentions.

MS. NAPOLITANO: We won't make that recommendation. Let me say for the benefit of the Commission members, we're keeping track of

all the vote counts, and we will let the relevant people know when something was ten to ten or eleven to two. There is a big difference in there in terms of the amount of consensus, and I appreciate that. I think we need to start getting people on the record. That's why I'm pushing through getting through this agenda today.

Are there any other changes to be made or recommendations from this Commission vis-a-vis the APAAC proposal deals with victims issues.

Gail?

MS. LELAND: On Page 3 -- no. Sorry. Page 11, Line Number 6, "The victim has a right to be present at the aggravation phase hearing."

I don't mind the herring, but I believe it needs to also include be present and testify or be present and heard.

MS. NAPOLITANO: Lois?

MS. YANKOWSKI: I think it the victim's testimony might not at all be relevant -- a victim's testimony might not be relevant to determine aggravating factors, and certainly

you wouldn't want the victim to have a right to be heard or to testify.

For example, whether the crime was cruelty and depraved, the victim's impact statement, I don't think, would be relevant to that. Whether the defendant had a prior felony conviction that would count as an aggravator. Whether the defendant that acted in a way to put other people at harm in the vicinity, the victim's testimony would not be relevant to those.

MS. NAPOLITANO: Steve?

MR. TWIST: I think it's misnomer to call it testimony. The victim has a right under the Constitution to be heard at this sentencing proceeding. If that merely means to stand up and say, "Ladies and gentlemen or the jury, I believe that the State has proven beyond a reasonable doubt the aggravating the circumstances," I think the victim has a right to do that.

MS. YANKOWSKI: I disagree wholeheartedly. The victim it not a party to the proceedings. It's the defendant and State.

MR. TWIST: Read the constitution.

MS. NAPOLITANO: I appreciate all points of view.

Is there anybody else?

The motion on the floor is that we recommend that the APAAC draft be amended in the relevant sections to say that the victim has the right to be present and heard at the aggravation phase hearing.

MR. TWIST: I wonder if we can't have a more universal approach to this, and I have not -- and I apologize -- gone through and identified every subsection or line where it would be appropriate to have language that clearly protected the victim's right to be present at each of these sentencing proceedings and the right to be heard, but I would offer as a substitute, if Gail would accept it, simply a motion that the language of the proposal be conformed to accomplish that goal.

MS. NAPOLITANO: Does everybody understand that? In other words, be present -- every time it says a victim be present, we would add be heard and make sure is complies.

MR. TWIST: Or vice versa.

MS. NAPOLITANO: That's the motion, and

is there a second?

MR. HASTINGS: I'll second.

MS. LELAND: Further, I would like --

MR. TWIST: Did she say no?

MS. LELAND: I would like the proposal to reflect that at each of the sentencing phases, where it talks about the aggravation hearing and then again where it talks about the sentencing hearing, so it's very clear.

MS. NAPOLITANO: I think that's the intent.

SENATOR SMITH: That's your motion.

MS. NAPOLITANO: I think that is the intent of the Twist motion. Everybody understand the Twist motion?

There is a second to the Twist motion.

All in favor the Twist motion, please raise your hands.

MR. UNKLESBAY: This is Rick. I'm in favor.

MS. NAPOLITANO: Nine in favor. All opposed. Three opposed. The motion carries.

MR. CARDENAS: I abstain.

MS. NAPOLITANO: How many abstentions? Five abstentions.

I think that takes us through --

Mr. Kimerer?

MR. KIMERER: I'm sorry. Madam Attorney General, I'm sitting here going through this whole process as it has evolved. I've heard the comments, and I sat here and listened to myself wrestled with these decisions, I realize how incapable I really am to reach any decision.

What Mr. Stookey has been saying all along is that we are sitting here, and the more we talk, the more I understand how little we know about what we're doing here, and it just gives me grave concern. I just want to put that on the record that I have many doubts about the votes I have just made, because I am so ill-informed, and all I do is see one more issue after another come up as we vote.

And I'm just going to put on the record that I'm afraid we've been making choices between two evils. It's a Hobson choice I've been in, and it's a very uncomfortable position to be in.

MR. JOHNS: I would like to express the same concern.

MS. YANKOWSKI: I would like to express the same concern.

MS. NAPOLITANO: Mr. Weisz?

MR. WEISZ: I appreciate that, and I understand what you're saying, but in light of Ring-making decision and in light of trying to find a way to have this state comply with that decision, what would you recommend as an alternative, other than as Chief Justice talked about or Dr. Bortner talked about, a motion to resolve or get rid of the death penalty?

MR. JOHNS: If you're asking me, I think more study -- reasoned study and meetings on this statute would not be harmful.

If the statute, as many of the prosecutors and I think APAAC believes is going to be retroactive anyway, then the additional time isn't really going to be a factor. It's still going to be applied so we could take more time to study.

There is the group that is pending trial now, and some of those -- it may be that some of those individuals might end up with a life sentence, but it would be far better in my judgment to spend more time going through this

and trying to make sure that we have something that we not all be embarrassed about later than to just throw something through that half the victim advocates understand and half the defense bar understands, and no one really understands.

So that's the argument, that we could take more time.

MR. CARDENAS: And I join in that.

MR. WEISZ: I understand what you're saying. I don't think want to do anything different than doing the best thing possible for us and that we don't want to cause more problems, which I think is what you're saying is, "Are we going to cause additional problems?"

At the same time I think there are things we can do. I think some of the things we have gone through -- that some people can understand to try to address those people in the process right now, and to ensure they get a fair trial and fair sentencing and a speedy trial and the processing, as well.

MS. NAPOLITANO: Let me, if I might, does anybody have something hasn't said.

MS. YANKOWSKI: I want to go on the record to say I've got 27 years of criminal defense experience. I've got [unintelligible] from Georgetown. I've been a professor of criminal law.

I am fairly certain that what we have done today is create -- if these proposals are enacted, we have created a statute that will undoubtedly be ruled unconstitutional on numerous issues.

MR. CARDENAS: Janet, I do have a question. The issue was raised before whether we would vote up or down on the APAAC proposal.

Are we going to do that?

I, for one, continue to be concerned and think that the proposal is seriously flawed in not providing definitions for aggravating factors and mitigating factors.

MS. NAPOLITANO: I think the alternative that the Commission followed was to go through the basic points on the APAAC proposal. Jose, I think the Commission went through the basic points of the APAAC proposal and voted on those up or down as opposed to the whole package.

MR. CARDENAS: I understand that, and I participated in that, but I thought there would be an opportunity to nevertheless since we discussed only a few discrete points and not, for example, the one I raised which has to do the serious flaw that I think exists. I'm satisfied that at least the record will reflect I do think the proposal is flawed.

MS. NAPOLITANO: Let the record so reflect.

MR. WEISZ: Just one thing to add. It's been good for me to hear back and forth and not just back and forth but a lot of different opinions on a number of things. I think that is important.

And should we have a special session, we would encourage the Legislature to have full hearings in every way possible so that every voice is heard and every opinion and every new idea that may come up, whether it's APAAC or anyone else.

I think there is a lot of things we can do and continue discussing these things. I think that is what the Commission has done. There are still things we want to continue

looking at and going forward. I think we all agree.

MS. NAPOLITANO: What we will do is get a transcript of this, right.

THE COURT REPORTER: Today?

MS. NAPOLITANO: Of what we did today.

THE COURT REPORTER: Oh, yes.

MS. NAPOLITANO: And I am serious. I understand there are divisions among the Commission, and I'm make sure that is fully reflected to the Governor and to the Legislature.

On some things there really wasn't much of a division. On some things we're about 50-50, maybe about where the rest of the country is.

I do think that this Commission has an obligation to at least put in its two cents worth. We can't have Ring reversed and not do that.

I understand that we could study this much, much longer, but also believe that we don't control that part of the process. And we need to understand that, as well.

We have other issues to discuss. We

wanted to have one final meeting of the Commission to go through the draft final report.

Diane, that has been made available to the members, right, the draft final report?

MS. SAUNDERS: Yes, it has.

MS. NAPOLITANO: Everybody should have that.

MS. SAUNDERS: It was passed out at the last meeting and for those not present, it was mailed.

MS. NAPOLITANO: My recommendation is let's not set a date for that right now because there are a host of issues in the summer. Many of us have meetings that we have to attend out of state. People are away on holiday.

We will try to find a date that maximizes the actual ability of the Commission to attend, and probably I would suggest, without nailing down, probably some time in late August, early September.

Steve?

MR. TWIST: We talked at a very early meeting whether the members of the Commission might individually have an opportunity to

append a short statement that clarifies certain issues. Is that still the intention.

MS. NAPOLITANO: It's what we did with the interim report, and it's my intention with the final report, so that if you have something separate you wish to say, you can keep -- you can preserve your record, as it were.

MR. CARDENAS: I have to run. Thank you very much.

MS. NAPOLITANO: Thank you, Jose. I think we've done as much we can do today.

I'll entertain a motion to adjourn.

MR. LeCLAIRE: So moved.

MS. NAPOLITANO: All in favor. Thank you.

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

BE IT KNOWN that the foregoing proceedings were taken before me, JoANN KLEMM, RPR, a Certified Court Reporter, Certificate #50022, for the State of Arizona; that all proceedings were taken down by me in shorthand and thereafter reduced to print by computer-aided transcription under my direction; that the foregoing pages are a full, true and accurate transcript of all proceedings, all done to the best of my skill and ability.

I FURTHER CERTIFY that I am in no way related to nor employed by any of the parties hereto nor am I in any way interested in the outcome hereof.

DATED at Phoenix, Arizona, this 16th day of July, 2002.

JoANN KLEMM, RPR, CCR
Certified Court Reporter #50022